Filed 2/10/04 In re Marcus W. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re MARCUS W., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY SOCIAL SERVICES, **Plaintiff and Respondent,** **v.** **ADREAN W. et al.,** **Defendants and Appellants.**	**A101940** **(Contra Costa County Super. Ct. No. J99-02211)**

Adrean W. and David T. appeal from an order made after a hearing pursuant to Welfare and Institutions Code section 366.26, with respect to the minor Marcus W., Jr.[1] Both maintain the court erred in precluding them from testifying at the hearing; Adrean argues the court also erred in terminating her parental rights. In addition, Adrean challenges the denial of her section 388 supplemental petition. We conclude appellants' arguments have no merit, and we affirm the orders.

I. FACTS AND PROCEDURAL HISTORY

Marcus W., Jr. (Marcus), was born in August 1999, to his mother, appellant Adrean W. (Adrean). His purported father is Marcus W., Sr. (Marcus, Sr.). Appellant David T. (David) is Adrean's boyfriend and Marcus's de facto parent.

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[1] Unless otherwise indicated, all further section references are to the Welfare and Institutions Code.

A. INITIAL AGENCY CONTACT AND DEPENDENCY PETITION

Marcus tested positive for cocaine at birth. Adrean admitted to the investigating social worker that she had used cocaine and consumed beer just before he was born. She agreed to a voluntary family maintenance plan, which required her to complete an outpatient substance abuse treatment program, participate in weekly Narcotics Anonymous (NA) meetings, submit to drug and alcohol testing, meet Marcus's medical needs, and maintain an appropriate residence. Adrean advised the social worker she was enrolled in "Born Free," a substance abuse treatment program.

By October 14, 1999, Contra Costa County Social Services (Agency) learned that Born Free intended to discharge Adrean because she had not attended the program since August 13. The relative with whom Adrean and Marcus were living advised the social worker that Adrean was homeless, using drugs, and leaving Marcus overnight with anyone who would keep him. A public health nurse reported that Adrean had appeared to be under the influence of drugs or alcohol, and on October 12 Adrean had tested positive for cocaine. In addition, Marcus was scheduled for surgery, and the Agency wanted to ensure the surgery would take place. Marcus was taken into temporary custody on October 15.

A few days later, the Agency filed a dependency petition, alleging that Adrean had failed to protect Marcus within the meaning of section 300, subdivision (b). Adrean and Marcus, Sr., appeared at hearings on October 27 and November 2, 1999, and Marcus, Sr., was granted presumed father status.

B. JURISDICTIONAL HEARING (NOVEMBER 1999)

At the jurisdictional hearing on November 9, 1999, Adrean admitted the allegations that she had a current substance abuse problem, tested positive for cocaine on October 6 and 8, 1999, and was unable to provide adequate housing for Marcus or herself. The court assumed jurisdiction over Marcus pursuant to section 300, subdivision (b).

Although Adrean had renewed her participation in the Born Free program in October, she stopped attending after November 15. Five times in October, she tested positive for cocaine.

On November 6, 1999, Marcus was placed with his paternal grandmother (Marcus, Sr.'s, mother). Soon thereafter, the paternal grandmother left to care for a sick relative out of state, and Marcus was placed in foster care.

C. DISPOSITIONAL HEARING (DECEMBER 1999)

Adrean and Marcus, Sr., appeared at the dispositional hearing on December 22, 1999. The court adjudged Marcus to be a dependent child and continued his placement in foster care. The court also ordered reunification services for Adrean, including substance abuse treatment, parenting classes, and drug testing.

D. SIX-MONTH REVIEW (JUNE 2000)

For the June 7, 2000, review hearing, it was noted that Adrean had enrolled in the residential La Casa Ujima Women's Recovery Program in February 2000, and she was testing negatively for drugs and alcohol. The foster mother brought Marcus twice each month to visit her, and in May the Agency permitted Marcus to stay with her for a 30-day overnight visit. Marcus had been diagnosed with fetal alcohol syndrome. Meanwhile, Marcus, Sr., had left the state in January 2000, without advising the social worker, and upon his return in April moved to Vallejo. He had made no progress on his family reunification plan.

In accord with the Agency's recommendations, the juvenile court returned Marcus to Adrean's custody under court supervision and provided her with family maintenance services. The court terminated reunification services for Marcus, Sr.

E. NOVEMBER 2000 REVIEW

The Agency's report for the November 29, 2000, review hearing advised that Adrean was renting a room from a friend, Beverly T. (sister of appellant David). Beverly's four daughters also lived in the house, which was "a little crowded, but . . . adequately furnished and appropriate." Marcus appeared to be healthy and relaxed during home visits, indicating that Adrean was taking good care of him, and she had

begun working. She was not, however, in compliance with her family maintenance plan: she had misstated facts to the social worker concerning her participation in an aftercare program; she failed to appear for drug testing in July and August 2000, on September 6, 12, 15, 20, and 29, 2000, and on October 30, 2000; she tested positive for alcohol on October 17 and 24, 2000, and on November 7, 2000; and she tested positive for cocaine on October 24, 2000.

The review hearing was continued to December 20, 2000, at which point the social worker indicated Adrean's performance had improved. The court continued Marcus as a dependent child in Adrean's care under court supervision, and ordered Adrean to continue participating in her family maintenance plan.

F. THE AGENCY'S SUPPLEMENTAL DEPENDENCY PETITION (APRIL 2001)

In April 2001, the Agency learned that Adrean had been so intoxicated on April 20, 2001, that her landlady had to care for Marcus. When the social worker responded to the home on April 23, David was introduced to the social worker as Adrean's former boyfriend. He advised that he visited regularly and that Adrean smelled of alcohol but denied drinking. The Agency observed that David was "very involved and concerned about Marcus," noting that David felt bonded to him, purchased items for him, and spent time with him. David believed he was Marcus's biological father and requested that he be tested for paternity.

The social worker took Marcus into temporary custody and, on April 25, 2001, the Agency filed a supplemental dependency petition pursuant to section 387. The petition alleged that Adrean continued to abuse alcohol on a regular basis, had tested positive for alcohol on April 12, was so drunk on April 20 that her landlady had to care for Marcus, failed to participate regularly in an aftercare substance abuse program, and failed to follow through with a referral for services. In addition, Adrean had failed to appear for drug testing appointments in March and April 2001.

At a hearing on May 2, 2001, David was referred to legal counsel, and the court thereafter ordered paternity testing. The test showed that David was not Marcus's biological father.

G. JURISDICTIONAL HEARING ON SUPPLEMENTAL PETITION (OCTOBER 2001)

On October 18, 2001, Adrean stipulated to the following amended allegation in the supplemental petition: "On or about April 20, 2001, the child's mother was so drunk that the mother's landlady had to care for the child, and the mother continues to have an alcohol abuse problem." The court sustained the petition on that ground.

H. DISPOSITIONAL HEARING ON SUPPLEMENTAL PETITION (DECEMBER 2001)

At the disposition hearing on December 13, 2001, the social worker observed that Marcus had bonded to both Adrean and David. David had been "very involved with Marcus since Marcus was a few months old," considered Marcus to be his son, and had openly taken Marcus into his home. The social worker opined: "Marcus is very attached to [David]. He sees him as his dad. Mr. [T.] has been involved with Marcus that I know of for at least the last year on a consistent basis; buys him toys, and plays with him, and he has been visiting regularly."

David sought to be granted presumed father status. Although he knew Marcus was not his biological child, David testified, he loved Marcus and acted as his father. David wanted Marcus to live with him and had kept Marcus overnight when David was living with Beverly. The court found that David was not Marcus's biological father, denied him presumed father status, but accorded him the status of de facto parent.

As to Adrean, it was noted that she had attended an intake session at Born Free on December 6, 2001, and was attending the program regularly. She was also on a waiting list for a residential treatment program. Although she had not submitted to drug testing for the Agency since her failed test in April 2001, she had become pregnant and a drug test administered by her physician on November 7, 2001, detected cocaine.

The court formally removed Marcus from Adrean's custody, denied her further reunification services, and set a section 366.26 hearing for April 9, 2002. Marcus remained in foster care. The court ordered a minimum of two visits per month for Adrean, permitting David to accompany her.

I. THE AGENCY'S INITIAL SECTION 366.26 REPORT (MARCH 2002)

In its report for the April 9, 2002, hearing, the Agency observed: "[i]n spite of Marcus' dire circumstances, (cocaine exposure, fetal alcohol diagnosis and failure to thrive diagnosis), Marcus is a seemingly happy, well adjusted child. He is bonded to his present foster mother and interacts well with the other foster child, age 2, also in the home. Marcus easily engages with his mother and de facto father David [T.], whom he sees as his father. Marcus visits with both on a regular basis." The Agency noted that Marcus looked forward to visits and began to have crying spells when they ended. In addition, Marcus had received parent-child therapy with Adrean since February 2002, and the therapist observed a strong attachment and good interaction and bonding between them. Nevertheless, noting that "Marcus is considered adoptable due to his age and his lovable personality," the Agency recommended a plan of adoption and termination of parental rights.

J. ADREAN'S INITIAL SECTION 388 PETITION (MARCH 2002)

On March 18, 2002, Adrean filed a petition pursuant to section 388, seeking six additional months of reunification services. She alleged her circumstances had changed, in that she was clean and sober, had entered a residential treatment program, and was in parent-child therapy with Marcus. In addition, she had given birth to a healthy, drug-free baby, Dashawn T., in February 2002, fathered by David.[2]

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[2] Dashawn was the subject of dependency proceedings as well. The Agency filed a dependency petition on February 14, 2002, and an amended petition on February 19, 2002, alleging Adrean continued to have a substance abuse problem, tested positive for cocaine during her pregnancy, and failed to reunify with Marcus. The petition also alleged that the Agency had not determined whether David was able to care for Dashawn. The court granted David presumed father status. At a hearing on April 9, 2002, Adrean admitted she "has a substance abuse problem for which she is now receiving treatment, and which impairs her ability to provide adequate care and supervision for the child [Dashawn]." Because the Agency found David had stabilized his housing arrangements and adequately provided for Dashawn's needs, Dashawn was placed with David on May 9, 2002. In its dispositional report, the Department noted David's involvement with Marcus and the strong bond between them. On May 14, 2002, the court ordered a family maintenance plan for David with respect to Dashawn.

The Agency opposed Adrean's petition, because 18 months of services had already been provided, yet Adrean had not stopped her substance abuse. Further, she had not entered her substance abuse program until a week before Dashawn's birth, offering "a thousand excuses as to why she could not go before." The Agency concluded she had not made sufficient changes in her life to guarantee she would succeed with six more months of reunification services. Noting she had previously completed a residential program, the Agency believed Adrean was at high risk for relapse once she returned to the community.

Nevertheless, in accord with the parties' stipulation on April 9, 2002, the juvenile court ordered six more months of reunification services, as requested in Adrean's petition, and vacated the date for the section 366.26 hearing.

K. REVIEW HEARING (MAY 2002)

As of the review hearing on May 14, 2002, the Agency reported that Adrean was visiting Marcus (and Dashawn) for one hour every Tuesday at her residential treatment facility and she was participating in individual therapy every other week with each child. The court adopted a family reunification plan for Adrean which required her to complete a residential substance abuse program, complete a parent education course, obtain suitable housing, and submit to drug testing. The court further ordered supervised visitation with Marcus for Adrean and David.

L. ADREAN'S RELAPSE AND THE AGENCY'S REPORT (OCTOBER 2002)

In its October 2002 status report, the Agency advised that Adrean had completed a residential substance abuse treatment program, participated in aftercare, attended numerous Alcoholics Anonymous/NA meetings, participated in parenting programs, was looking for housing, and had been appropriate in attending and participating in activities for Marcus. However, she had missed seven drug tests between July and October 2002, and had four or five unexcused absences from her substance abuse treatment program. Her substance abuse counselor was concerned about her sobriety and veracity, noting her excuses did not withstand close scrutiny. The Agency recommended terminating family reunification services and setting Marcus's case for a selection and determination hearing pursuant to section 366.26.

At the contested review hearing on November 19, 2002, the parties stipulated that Adrean's reunification services would be terminated, another section 366.26 hearing would be set, and Adrean could file a new section 388 petition to be heard on the same date.[3]

M. ADREAN'S NEW SECTION 388 PETITION (FEBRUARY 2003)

On February 19, 2003, Adrean filed a section 388 modification petition, requesting that Marcus be returned to her custody. She alleged she had graduated from her residential substance abuse program, completed several parenting classes, and obtained safe and suitable housing. The modification would be in Marcus's best interest, she asserted, because he could be raised by his mother in a safe, drug-free home and maintain his close bond with Adrean, David, and Dashawn.

The Agency opposed the petition, noting that the court had terminated reunification services in November 2002, notwithstanding her graduation from a treatment program in October 2002, because she was unable to explain her missed drug tests and absences from the aftercare program. Furthermore, Marcus had been in the dependency system since birth, Adrean had never successfully completed her service plan, she had never proven an ability to remain sober, and the Agency could not verify she had secured permanent housing. Marcus had been living with his foster mother for 22 months (more than half of his life) and identified her as both "Mama" and "daddy," and she was qualified and desired to adopt him.

N. THE AGENCY'S SECTION 366.26 REPORT (FEBRUARY 2003)

In its February 2003 report for the section 366.26 hearing, the Agency confirmed that Marcus's foster mother desired to adopt him. She had two adult children, one by birth and one a former foster child of hers, whom she had adopted. She had also served as a foster mother for many children who had various problems associated with prenatal drug exposure and abandonment. The Agency noted that David had continued to visit

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[3] As to Dashawn, the court dismissed the dependency petition and placed him with David.

weekly with Marcus, and Marcus enjoyed the visits very much. The Agency recommended that the court select a plan of adoption and terminate parental rights.

O. SECTION 388 AND SECTION 366.26 HEARINGS (FEBRUARY 25, 2003)

On February 25, 2003, the court considered Adrean's modification petition under section 388 and conducted the section 366.26 hearing.

1. Section 388 Petition

The court first considered Adrean's section 388 petition. Adrean's counsel clarified that the purported change of circumstances underlying the request for modification was that Adrean had completed her outpatient day treatment program (rather than a residential program, as alleged in the petition), and secured housing. When asked for an offer of proof that the return of Marcus to her custody would be in his best interest, Adrean's counsel pointed out: Adrean had almost never missed a visit with Marcus; David was "very bonded" with him; Marcus considered David to be his father; David and Adrean had visited Marcus every week; Adrean had overcome the problems that had led to the dependency; and Marcus's bond with Adrean, David, and Dashawn was more important than the strong bond between Marcus and his foster mother. David's counsel supported the petition, asserting that Adrean had completed her plan, was in suitable housing, sober, and had a plan to take care of Marcus, David would materially support Adrean, and Dashawn had a substantial relationship with Marcus.

Marcus's counsel opposed the 388 petition, stating: "I support the Department's argument, your Honor. Marcus is in the only home he's ever known, permanent home, and he does very well there. It's a wonderful home. He has access and will continue to have access to his birth family through that home. There's no opposition to that, and although mother says she has done her plan, she hasn't participated in his preschool, his needs, other than as they meet her needs. She visits him weekly. She brings him candy. That's about it."

The court summarily denied Adrean's section 388 petition for failure to make a prima facie showing.

2. Section 366.26 Hearing

In the section 366.26 hearing, the court noted it had read and considered the Agency's section 366.26 report. The Agency submitted its case on the basis of the report.

Adrean's counsel called social worker Joan Miller as a witness. She acknowledged that: a previous social worker in January 2002 indicated it would be difficult for Marcus to be adopted because of his bond with Adrean and David; the Agency's initial section 366.26 hearing report favorably described the visits among Marcus, Adrean, and David; and visit supervisors in September through December 2002 had observed that Marcus was "ecstatic" to see them and hugged Dashawn and assisted him in being seated in a chair.

Adrean's counsel advised the court that she intended to call Adrean as a witness, to present evidence pertaining to the statutory exceptions to the general rule requiring termination of parental rights (see § 366.26, subds. (c)(1)(A), (E)). When David's counsel indicated he would also call David as a witness, the court asked for offers of proof to determine the relevance of the testimony. After considering these offers of proof (which we set forth in our discussion *post*), the court declined to permit Adrean or David to testify.

At the conclusion of the hearing, Miller advised the court that the foster mother was open to on-going contact with Adrean after parental rights were terminated, although with discretion as to its duration. Miller explained: "I don't believe . . . that she has any intention of denying Marcus any contact with his mother or his brother or [David]. But, if I could just add, there do need to be parameters around it [*sic*]."

The court found that Marcus was adoptable, terminated parental rights, and chose adoption as the permanent plan. In addition, the court ordered monthly sibling visits, and directed the Agency to attempt to work out a voluntary agreement with the foster (adoptive) mother concerning visitation for Adrean and David.

Adrean and David each filed a notice of appeal.

II. DISCUSSION

Adrean contends the juvenile court erred by (1) precluding her from testifying at the section 366.26 hearing; (2) denying her section 388 petition; and (3) finding inapplicable the exceptions to termination of parental rights set forth in section 366.26, subdivisions (c)(1)(A) and (E). David asserts the court erred in precluding him from testifying at the section 366.26 hearing. The Agency disputes appellants' arguments and contends David lacks standing to appeal. We address these issues in a slightly different order, and conclude that appellants' contentions have no merit.

A. DAVID'S STANDING TO APPEAL

To have standing to appeal, a party must be aggrieved by the juvenile court's orders. (See *In re Daniel M.* (2003) 110 Cal.App.4th 703, 709.) "To be aggrieved, a party must have a legally cognizable interest that is injuriously affected by the court's decision." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 948 (*L.Y.L.*).) We "liberally construe the issue of standing and resolve doubts in favor of the right to appeal." (*Ibid*.)

The Agency argues that David lacks standing, because his status as a de facto parent was not changed by the court's rulings. However, David has standing to complain that his due process rights were violated by the denial of his request to testify at the section 366.26 hearing. As a general matter, a de facto parent may "[p]resent evidence" at "any hearing . . . at which the status of the dependent child is at issue." (Cal. Rules of Court, rule 1412(e); see *In re Patricia L*. (1992) 9 Cal.App.4th 61, 66.) "Although it is clear that de facto parents do not have all the substantive rights and preferences of legal parents or guardians, they have been afforded procedural rights in order to 'assert and protect their own interest in the companionship, care, custody and management of the child' . . . and to 'ensure that all legitimate views, evidence, and interests are considered' by the juvenile court in dependency proceedings." (*In re Jonique W*. (1994) 26 Cal.App.4th 685, 693.) Furthermore, as a de facto parent David has standing to assert that adoption is not an appropriate permanent plan for Marcus, because, for example, it

would terminate his sibling relationship to Dashawn. (See *L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 948-951.) We conclude David has standing to appeal.[4]

B. ADREAN'S AND DAVID'S RIGHT TO TESTIFY

A parent has a right to due process at a section 366.26 hearing. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816 (*Jeanette V.*); see *In re Johnny M.* (1991) 229 Cal.App.3d 181, 190-191 [parent is entitled to a contested hearing when the court considers permanent placement of the child with another person].) In general, a de facto parent may also present evidence at a hearing to determine the child's status. (Cal. Rules of Court, rule 1412(e).) However, "[t]he due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*In re Jeanette V.*, *supra*, at p. 817.) Accordingly, the juvenile court may properly require an offer of proof before holding a contested section 366.26 hearing on one of the statutory exceptions to termination of parental rights. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 (*Tamika T.*).)

The parties' offer of proof must be specific, "setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued." (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) "'The judge may properly reject a general or vague offer which does not indicate with precision the evidence to be presented and the witnesses who are to give it.'" (*Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 167-168.)

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4 The Agency also contends that David never asked the juvenile court for an order of visitation. At the hearing, however, the following exchange occurred between court and counsel: "[DAVID'S COUNSEL]: Your Honor, can could [*sic*] I clarify something? [¶] THE COURT: Sure. [¶] [DAVID'S COUNSEL]: I want my client, who is a defacto parent here, to continue to have visits, and was that dealt with in your order? [¶] THE COURT: No. I said mother. I didn't say defacto parent. So I'm not ordering visits for defacto parent. I will allow the same consideration. I'll ask the social worker to try to work with the present foster parent to see if he can -- [David] can be allowed to visit the same time as [Adrean] under the same circumstances." In any event, this omission of a request for visitation would be germane (at least under the concept of waiver) if David

We therefore examine Adrean's and David's offers of proof, to determine if they specifically set forth actual evidence to be presented with respect to the statutory exceptions contained in section 366.26, subdivisions (c)(1)(A) and (E). In our review, we apply the abuse of discretion standard. (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 753, 759.) Under this standard, we will not disturb the juvenile court's decision unless it was arbitrary, capricious, or patently absurd. (*Adoption of D.S.C.* (1979) 93 Cal.App.3d 14, 24-25.)

1. The Offers of Proof

If a child will likely be adopted within a reasonable time after termination of parental rights, the juvenile court must terminate the parental rights unless it would be detrimental to the child due to circumstances set forth in section 366.26, subdivisions (c)(1)(A) through (E). In the matter before us, Adrean and David asserted that their testimony would be germane to section 366.26, subdivisions (c)(1)(A) and (E). Under section 366.26, subdivision (c)(1)(A), adoption may not be appropriate if it would substantially interfere with the bond between parent and child. Under section 366.26, subdivision (c)(1)(E), adoption may be inappropriate if it would substantially interfere with the child's relationship with a sibling.

According to Adrean's offer of proof, she would "testify as to her contact with Marcus . . . over the last year or so. She would [flesh] out more details of the visits as to what Marcus calls her, what he calls [David]. She can testify to the interaction between [Marcus] and [Dashawn]. She'll also talk about her cooperation with the IEP process. There was an indication . . . that [Adrean] was not cooperating with that, and I can explain why." Adrean's counsel added that she maintained constant visitation with Marcus, Marcus was extremely important to Adrean and David, Marcus was always excited to see them, Adrean had been involved with his school, David had attended every court hearing and visit, and David was Marcus's only father figure.

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were challenging the court's refusal to order visitation. Instead, David mentions the visitation issue to demonstrate the relevance of the testimony he sought to give.

David's offer of proof was that David had "continued contact with Marcus," and he could testify about the contacts Marcus had with Adrean and Dashawn as well. David's counsel asserted, "we'll talk about the details of that relationship, the visits, the parent bond that exists." In addition, David wanted to testify that he desired to adopt Marcus and the Agency should have evaluated Marcus for placement with David. David's counsel asserted: "[David] stands in the shoes as a stepfather, and I think he should be considered as a -- under the statute as basically a relative kind of placement. Granted that the parties, that [Adrean] and [David] never married, but he still has that kind of relationship with the child, Marcus."

2. Analysis

Adrean and David sought to testify about (1) Adrean's bond with Marcus; (2) David's bond with Marcus; and (3) the sibling bond between Marcus and Dashawn. Evidence concerning David's bond with Marcus was immaterial, because he was neither a parent, within the meaning of section 366.26, subdivision (c)(1)(A), nor a sibling. His counsel conceded as much at the hearing.[5] Although the other topics were pertinent to the parental bond and sibling bond exceptions, for the most part the offers of proof did not specify the particular *facts* to which Adrean or David would testify. As such, they did not possess the requisite specificity. (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.)

Furthermore, the specific facts that *were* mentioned in the offers of proof reiterated information already provided to the court. For example, Adrean's counsel represented that she would testify how Marcus was ecstatic to see them on visits. The social worker, however, had already acknowledged this evidence. As Adrean points out in her reply brief, it was *un*controverted that she visited Marcus regularly and acted

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[5] "[COUNTY COUNSEL]: . . . And [David's] relationship to the child is not relevant because you don't get into a (c)(1)(A) exception because of a relationship with an unrelated adult who is a de facto parent. It's just not contemplated by the statute. [¶] THE COURT: Actually, I thought I assumed that [David's counsel] knew that and that he was going to have his client testify to his observations of the visits between mother and child. Was that what you were doing? [¶] [DAVID'S COUNSEL]: That's correct, your Honor, and also the child with sibling."

appropriately during these visits, and Marcus responded enthusiastically. Although Adrean also wanted to testify that she attended meetings, filled out forms for Marcus, and was interested in seeing how he develops, these matters could not demonstrate a parental bond sufficient to warrant application of the parental bond exception.

Indeed, neither David nor Adrean proffered testimony indicating Marcus would suffer *detriment* from termination of the parental bond or sibling relationship, to the point that the continuance of either relationship outweighed the benefits Marcus would obtain from adoption. (See *In re Beatrice M*. (1994) 29 Cal.App.4th 1411, 1418 [parental relationship] (*Beatrice M.*); *L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 951-953 [sibling relationship].) Without such evidence, the exceptions could not be established as a matter of law, rendering irrelevant the facts they sought to convey in their testimony.

Appellants' arguments on this point are unpersuasive. First, Adrean complains that her testimony would have taken only 15 minutes. This estimate was provided by counsel, and did not consider the additional time that would have been consumed by cross-examination or redirect. Moreover, while the short duration of the intended testimony might suggest it would not have substantially delayed the proceedings, it also confirms Adrean did not have much evidence to offer. And irrelevant testimony, even though brief, is still irrelevant.

Next, David complains that the court focused on whether his testimony was relevant to the parental bond exception and overlooked the sibling bond exception. Because neither his offer of proof nor the evidence he presented indicated that the continuance of the sibling relationship would outweigh the benefits of adoption, however, the exception was unavailable as a matter of law. Under these circumstances, there is no material significance to the juvenile court's failure to express the obvious shortcomings of David's offer of proof.

David also contends the matters to which he referred in his offer of proof, including his relationship with Marcus, were germane to an appropriate visitation schedule. At the hearing, however, he did not contend his proposed testimony was relevant to visitation. Rather, he and Adrean both asserted relevance under section

366.26, subdivisions (c)(1)(A) and (E). We note as well that he does not challenge the substance of the visitation order in this appeal.

Finally, David's reliance on *Katzoff v. Superior Court* (1976) 54 Cal.App.3d 1079 (*Katzoff*), is misplaced. At a review hearing in *Katzoff*, the social services department requested that the child be removed from his foster parents' home, on the ground the foster parents had failed to cooperate with the department. The foster parents' counsel disputed the allegation, and offered the testimony of the foster mother, to the effect that they had cooperated with the department fully. The juvenile court refused to allow any testimony and authorized the child's immediate removal. (*Id*. at pp. 1082-1083.) Concluding the foster parents had standing as de facto parents, the appellate court issued a writ of mandate, commanding a hearing at which the foster parents could appear as parties. (*Id*. at p. 1085.) The court explained: "If the participation of the foster parents, either through their testimony *or by their presentation of other evidence*, would have provided the court with relevant information as to [the child's] best interests, the court should have permitted their participation and considered the evidence presented." (*Id*. at p. 1084, italics added.)

Katzoff is factually distinguishable and unhelpful to our analysis. Unlike the foster parents in *Katzoff*, Adrean and David were permitted to participate in the proceedings and present evidence. Moreover, the evidence the foster parents proffered—that they had cooperated with the department—was obviously relevant to the department's contention they had not. (*Katzoff, supra,* 54 Cal.App.3d at p. 1085.) Adrean and David, by contrast, did not demonstrate that their testimony would be relevant to any cognizable exception to the termination of parental rights.

Appellants have failed to show error in the court's decision to preclude them from testifying.

C. TERMINATION OF ADREAN'S PARENTAL RIGHTS

Adrean maintains the court should have found that section 366.26, subdivisions (c)(1)(A) and (E), precluded termination of Adrean's parental rights. We review the

court's ruling for substantial evidence. (*In re Jasmine D*. (2000) 78 Cal.App.4th 1339, 1342; *In re Jacob S*. (2002) 104 Cal.App.4th 1011, 1017.)

1. Parental Bond Exception (§ 366.26, subd. (c)(1)(A))

Under section 366.26, subdivision (c)(1)(A), adoption may not be an appropriate permanent plan if "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) This exception applies when the parental relationship promotes the well-being of the child to such a degree that it outweighs the well-being he would obtain in a permanent home with adoptive parents, balancing "the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575 (*Autumn H*.).) As the court in *Autumn H*. explained: "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be *greatly harmed*, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid*., italics added.)

Adrean contends she visited Marcus regularly and acted appropriately with him, and he enjoyed the visits. In addition, she has had contact of some sort with him since he was born, and a bond between them has formed. But neither the evidence she presented, nor her offer of proof, established that this bond was such that Marcus would be greatly harmed if Adrean's parental rights were terminated.

As of the time of the February 2003 hearing, Marcus had lived with his foster mother for 22 months (the vast majority of his life), identified her as his mother, and was doing well in her care. She desired to adopt him, was qualified to adopt him, and was experienced in caring for children who had problems arising from prenatal drug exposure and abandonment. By contrast, Adrean had been clean and sober for at most four months, and her relationship with Marcus consisted solely of visitation once a week. While it can be inferred that Marcus would miss Adrean if their relationship were severed, there was no *evidence* that Marcus would be "greatly harmed." (*Autumn H*.,

supra, 27 Cal.App.4th at p. 575; see *Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419.) Substantial evidence supported the juvenile court's determination.

Adrean protests that she established a relationship as parental as possible given the visitation limitations imposed by the Agency. This may be true, and by no means do we trivialize Adrean's efforts in this regard. However, we cannot lose sight of the purpose behind section 366.26, subdivision (c)(1)(A). The parental bond exception applies where an overriding parental bond has *already* been established, not where a parent contends such a bond should have, could have, or would have been established under different circumstances.

2. Sibling Relationship Exception (§ 366.26, subd. (c)(1)(E))

Under section 366.26, subdivision (c)(1)(E), adoption may not be the appropriate permanent plan if it would substantially interfere with the child's relationship with a sibling, taking into consideration "whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).) Thus, the mere existence of a sibling relationship is not enough. The relationship must be so significant that its termination would inflict detriment on the child, and the continuance of the relationship would outweigh the benefits of the permanency of adoption. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 952-953.) On this issue, the parent bears the burden of proof. (*Id.* at p. 952.)

In the matter before us, Marcus and Dashawn had not been raised together and, in fact, had never lived together. Nor had they shared significant common experiences. Although there were signs of affection between them—Marcus hugged Dashawn and helped him into a chair—there was no *evidence* that Marcus would be harmed if the relationship were terminated or that the continuance of their bond outweighed the benefit of legal permanence through adoption.

Adrean points out that the juvenile court's jurisdiction terminates upon adoption (§ 366.29, subd. (c)) and sibling contact may be secured only with the consent of the adoptive parent (§ 366.29, subd. (a)). She then asserts: "If this bond is broken between the two brothers, Marcus will never again have a biological brother to share their growing up together. The impact of this loss can never be repaired in the future." This rhetoric, however, does not overcome the absence of any evidence of harm to Marcus as a result of the termination of parental rights or cessation of the sibling relationship. And even if Adrean's speculation reflects a reasonable inference from the evidence that *was* presented, it is not our role to choose between alternative inferences the court could have reasonably made. (*L.Y.L.*, *supra*, 101 Cal.App.4th at p. 947.) Our task is limited to determining whether there was substantial evidence to support the inference the court *did* reach; and for the reasons set forth, we conclude there was.

Consistent with our conclusion is *L.Y.L*, *supra,* 101 Cal.App.4th 942. There, a four-year-old girl had lived with her brother and mother for 14 months, and then lived with her brother in a foster home for another 14 months. The siblings were very close, lived together most of their lives, and had shared similar experiences while living in the foster home and while living with their mother. Further, the evidence showed, the girl would miss her brother and worry about his safety if they were separated. There was, however, "no evidence [the child], other than being sad, would suffer detriment if the relationship ended." (*Id*. at p. 952.) Accordingly, the court concluded the sibling bond exception did not apply, because the parent had not proven that termination of her parental rights to the girl would substantially interfere with the girl's relationship with her brother. (*Ibid*.) Nor had the parent demonstrated that any detriment to the child outweighed the benefit to be obtained by adoption. (*Ibid*.; see *In re Erik P*. (2002) 104 Cal.App.4th 395, 404-405 [sibling relationship not sufficiently substantial where child spent only two months in the home with his brother before moving to an adoptive home, where he spent the vast majority of his life].)

Adrean has failed to demonstrate error in the court's termination of her parental rights.

D. DENIAL OF ADREAN'S SECTION 388 PETITION.

Adrean challenges the juvenile court's summary denial of her section 388 petition, which sought modification of a prior order terminating reunification services, by return of Marcus to her custody. We review the court's decision for an abuse of discretion. (*In re Angel B*. (2002) 97 Cal.App.4th 454, 460 (*Angel B*.).)

A juvenile court order may be changed, modified, or set aside under section 388 if the petitioner establishes: (1) there is new evidence or changed circumstances, *and* (2) the proposed modification of the order would promote the child's best interests. (*In re Zachary G*. (1999) 77 Cal.App.4th 799, 806.) If the petitioner makes a prima facie showing of these elements, she is entitled to a hearing. Whether a prima facie showing has been made "depends on the facts alleged in her petition, as well as the facts established as without dispute by the court's own file (e.g. [the child's] age, the nature of [his] existing placement, and the time [he] came into care as a dependent child)." (*Angel B*., *supra*, 97 Cal.App.4th at p. 461.)

Here, Adrean alleged that she had completed a residential treatment program, attended several parenting classes, and had obtained suitable housing for herself and Marcus. At the hearing she clarified that she had completed an outpatient program, rather than a residential program. Assuming these events constituted new or changed circumstances, Adrean failed to make even a prima facie showing that the modification she requested would be in Marcus's best interests.

In this regard, Adrean argued that Marcus would benefit from being raised by his biological mother in a safe, drug-free home, where he could enjoy a close bond with her as well as with David and Dashawn. The Agency responded that Adrean had never fully completed her service plans and, in light of her history, the Agency was not convinced she would remain sober. As confirmed by the court's file, her failure to comply with a voluntary family maintenance agreement had led the Agency to file the dependency petition. When Marcus returned to her custody in June 2000, she resumed drinking. By December 2001, she had not submitted to substance tests for months, and tested positive for cocaine in a test administered by her obstetrician. At the November 2002 review, it

was reported she had missed substance tests and program sessions, without any satisfactory explanation. As of the section 388 hearing, she had been clean and sober for only four months, at most. In the meantime, Marcus had lived for nearly two years with his foster mother, who was qualified and desired to adopt him. It cannot be said that the juvenile court acted irrationally in concluding that Adrean had failed to show it would be in Marcus's best interests to remove him from his foster mother's custody and place him with Adrean. (See § 366.3, subd. (e) [presumption that child should remain in his placement]; *Angel B*., *supra*, 97 Cal.App.4th at p. 465.)

Lastly, Adrean's assertion that children have a "natural right" to live together, based on *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 814, is misplaced. *Williams* pertained to an order separating siblings who had always lived together until their parents divorced. Marcus, by contrast, has spent most of his life in foster care, and has never lived with Dashawn.

Adrean has failed to demonstrate an abuse of discretion.

III. DISPOSITION

The orders are affirmed.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.